No. 89-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OCEAN STATE PHYSICIANS HEALTH PLAN, INC., *et al.*,
Petitioners,

v.

BLUE CROSS AND BLUE SHIELD OF RHODE ISLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMERICAN MANAGED CARE AND REVIEW ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The American Managed Care and Review Association ("AMCRA") respectfully submits this brief amicus curiae in support of the pending petition for a writ of certiorari in this case in order that this Court may consider precisely how the decision below undercuts the utility of Section 2 of the Sherman Act, 15 U.S.C. § 2, as a protection for competition, not only in markets for health care-financing, but also in markets for health care services, particularly physician services.

1. AMCRA is a national trade association comprising over 500 health maintenance organizations ("HMOs"), preferred-provider organizations ("PPOs"), and other nontraditional mechanisms for financing and delivering medical care. Many AMCRA members are HMOs of the individual practice association ("IPA") variety, which depend for their competitive attractiveness on being able to offer access to a substantial number of community physicians, just as Blue Cross and Blue Shield plans typically do. The petitioner, Ocean State Physicians Health Plan, Inc. ("Ocean State"), is an IPA-type HMO and a member of AMCRA. Unlike Blue Cross and Blue Shield, IPA plans such as petitioner's place physicians at risk through the implementation of "physicians withholds" and other financial incentives.

2. HMOs have grown rapidly. "In 1970 there were 37 HMOs enrolling 3 million people. This January, there were 607 serving 32.5 million . . . ." *Many in Medicine Are Calling Rules a Professional Malaise*, New York Times, Feb. 19, 1990, at A1, A13.[1] AMCRA and its members are concerned that the decision of the court of appeals in this case, if allowed to stand, would legalize a variety of practices on the part of dominant health

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[1] IPA-type HMOs have been growing rapidly (J.A. 34).

insurers that will slow or even reverse the growth of competitive medical plans. In particular, a dominant insurer's practice of penalizing physicians for participating in an IPA-type HMO, in the way that Blue Cross and Blue Shield of Rhode Island ("Blue Cross") did in this case, can injure competition by eliminating the value of financial incentives, clearly threatening the existence of IPA-type HMOs.[2]

3. Because the parties litigated this case, and the lower courts decided it, with predominant regard to the effects of the challenged practices in the market for private health insurance and health care financing, the record, briefs, opinions, and the pending petition to this Court do not fully illuminate the significance of the case for the vigor of competition in another, even more important market—namely, the market for physician services. AMCRA is concerned that the court of appeals failed to appreciate how the respondent monopolist, in seeking to perpetuate and enhance its own market power, intentionally suppressed competition in this market. Because many AMCRA members were organized by physicians for the specific purpose of competing for patients in markets dominated by traditional health insurers like Blue Cross, AMCRA is in a good position to call the Court's attention to the destructive strategies employed by such insurers.

SUMMARY OF ARGUMENT

In holding that Blue Cross' Prudent Buyer program could not, as a matter of law, be deemed an exclusionary practice, the court of appeals invalidated the jury's contrary assessment of an admitted monopolist's conduct and rendered irrelevant all of the record evidence establishing (1) Blue Cross' predatory intent—specifi-

[2] While many HMOs are now quite large, none has a dominant market position in any market. The largest HMO is the Kaiser Foundation Health Plan. The largest IPA-type HMO is owned by U.S. Healthcare. Interstudy, *The Interstudy Edge* 28 (Summer 1988).

cally, its primary interest in raising the costs of its competitor, Ocean State; (2) the actual exclusionary nature of Blue Cross' practice—despite its ostensible business purpose; and (3) the actual, direct effects of the practice on Ocean State's competitiveness, on the price of health insurance, and on consumer welfare. The court's ruling amounted to the creation of an unprecedented rule of per se legality for any exclusionary practice for which a defendant monopolist offers a colorable business rationale. This holding is directly at odds with accepted understanding of Section 2 of the Sherman Act.

The court of appeals apparently adopted its rule of per se legality in an attempt to accommodate the significant shift that has occurred in antitrust economic thinking in the last two decades. This new thinking, which this Court has ratified to some extent, has generally featured greater skepticism toward private treble-damage suits, greater receptivity to efficiency-based defenses, and special vigilance to prevent competitors from using Section 2 to deter hard competition by large firms. Despite the virtues of this new economic thinking, however, the conduct of the monopolist challenged in this case should not have been given the extraordinary protection implicit in a rule of per se legality, a standard which this Court has never endorsed.

The court of appeals made fundamental errors of factual and economic analysis in interpreting the Prudent Buyer program as a normal business' attempt to lower its input costs. However, a comparison with the business practices of other health insurers, which are well documented in other cases, shows that Blue Cross did not in fact seek to buy physicians' services at the most favorable (or even at competitive) prices. In dealing with Ocean State physicians, its primary object was to induce them to accept the higher price, not the lower one. By paying physicians generously and *not* using its potential buying power aggressively against them (until some of them stepped out of line by marketing through Ocean State), it hoped to remain their sole marketing

agent, with all the monopoly power attendant on that position. The lower court's failure to recognize the nature of Blue Cross' monopoly and the consequences of its conduct demonstrates the danger of a legal rule under which any appearance of a business justification forecloses further inquiry into the purpose and effect of a monopolist's behavior.

The other Blue Cross practices challenged by Ocean State—those that the court of appeals deemed immunized by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, —are likewise easily employed by dominant health insurers to maintain market control by excluding HMOs and other competitive medical plans. AMCRA therefore urges this Court to rule that the McCarran exemption, which was enacted well before the implied exemption for "state action" became crystallized, embodies the same requirement of "active state supervision" of exempt private conduct that the Court now imposes as a prerequisite for state-action immunity.

Ocean State's petition should be granted not only because this case raises serious issues of antitrust doctrine but also because the challenged practices have grave implications for the state of competition in the enormous health care industry which currently represents approximately 11% of this country's Gross National Product. *Changes in Medicine Bring Pain to Healing Profession*, New York Times, Feb. 18, 1990, at A1. In particular, the development of competitive health plans, particularly HMOs of the IPA variety, is jeopardized by the practices of which Ocean State complains. Nontraditional mechanisms for financing and delivering health care are essential vehicles for introducing effective price (as well as quality) competition into local markets for providers' services, where such competition has long been lacking because of the traditional practices of conventional health insurers. This case presents a classic instance of a nonprofit health insurer that, in pursuing its own monopolistic objectives, has suppressed competition in the market for physician services.

ARGUMENT

I. This Case Offers This Court an Ideal Opportunity to Clarify How the More Consumer-Oriented, Less Protectionist Approach to Antitrust Law That It Has Taken Since the 1970s Applies to the Appraisal of Conduct of a Monopolist Under Section 2 of the Sherman Act and, Specifically, to Clear Up the Confusion Prevailing in the Lower Courts on the Important Subject of "Non-Price Predation"

Since the mid-1970s, this Court has significantly refined its analysis in antitrust cases to take a more pragmatic approach in the search for adverse effects on competition. For example, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Court moved away from evaluating horizontal mergers almost exclusively on the basis of market shares, inviting a more searching analysis that focuses on the actual competitive consequences. Similarly, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Court overruled its previous per se approach to non-price vertical restraints, recognizing that restrictions on the number and competitive independence of a manufacturer's distributors can sometimes strengthen competition between manufacturers, benefitting consumers. More recently, in appraising competitor collaboration under Section 1 of the Sherman Act, 15 U.S.C. § 1, the Court has demonstrated a new willingness to recognize that such collaboration may often promote efficiency more than it harms competition, thereby increasing consumer welfare. *E.g.*, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

Despite the strides that this Court has made in helping lower courts assess business combinations and concerted action for consistency with the statutory mandate to preserve competition in the interest of consumers, it has yet to provide comparable guidance for appraising the conduct of dominant firms under Section 2 of the Sherman Act. Indeed, it has decided only one case under

Section 2 in the last 16 years, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Because of its unusual facts that case did not effectively clarify the significance for Section 2 analysis of the new antitrust thinking, under which, conduct, that is truly efficiency-enhancing, may be valued for its own sake even if a competitor's survival may be jeopardized.

In the absence of clear guidance from this Court, some lower courts, taking their cue from this Court's generally greater skepticism toward private antitrust actions, have allowed large, even dominant, firms somewhat greater leeway to respond to competition than older Supreme Court precedents seemed to contemplate.[3] Although many of these lower court rulings appear to give correct effect to the Court's view that antitrust law is intended to protect "competition, not competitors," [4] the Ocean State decision in the court of appeals demonstrates that there is a danger that the pendulum may swing too far, depriving Section 2 of its vitality as a defense against practices that on close inspection can be shown to be predatory or exclusionary.[5]

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[3] *See, e.g.*, R. Bork, *The Antitrust Paradox* 136-60, 299-309, 344-46 (1978); *compare United States v. Griffith*, 334 U.S. 100, 107 (1948) (dictum implying that doing business as a monopolist or using monopoly to gain a competitive advantage is unlawful without regard to how power was obtained) *with Telex Corp. v. IBM Corp.*, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) (putative monopolist allowed to use "ordinary marketing methods available to all in the market") *and Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (monopolist entitled to enjoy, in competitive markets, benefits flowing from vertical integration with its monopoly).

[4] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

[5] Indeed, the so-called "Chicago School" of economic analysis, in reacting against the era when some procompetitive conduct may have been penalized too quickly, may have encouraged the courts to go to the opposite extreme of tolerating—even legalizing per se—conduct that in some circumstances can create or perpetuate a

The extensive literature on predatory pricing has helped the lower courts to develop the law in that area with considerable sophistication.[6] More recently, however, scholars have begun to refine the notion of strategic behavior by a monopolist, particularly the phenomenon increasingly known as "non-price predation."[7]

Unfortunately, case law in the lower courts has not revealed a sophisticated grasp of the issues involved in non-price predation. *See* Krattenmaker & Salop, *Analyzing Anticompetitive Exclusion*, 56 Antitrust L.J. 71, 89-90 (1987) (noting that "substantial disarray" in laws governing exclusionary conduct reflects conflict between prevailing doctrine and "pleas for laissez-faire" rules of per se legality). Unlike predatory pricing, non-price predation can take many forms and easily eludes efforts to develop objective, cost-based tests. The instant case provides an opportunity for this Court to supply up-to-date economically based principles for applying Section 2 to non-price predation.

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monopoly unjustified by efficiency and harmful to consumers' interests. *See Challenges to the Chicago School Approach*, 58 Antitrust L.J. 627 (1989). Recent scholarship develops just this thesis in a variety of areas of antitrust law but most particularly in the area of exclusionary conduct. *E.g.*, Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 215, 255-83 (1985) (discussing "strategic behavior," including "raising rivals' costs"); Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985).

[6] *See, e.g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), and cases and articles cited therein.

[7] The leading article developing this new theme is Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986). This Court has so far provided only limited guidance on this important subject. In *Aspen Skiing*, the Court defined the issue as whether the monopolist had tried to exclude a rival "'on some basis other than efficiency.'" 472 U.S. at 605, quoting R. Bork, *supra*, at 138. But, because the defendants offered no business justification whatsoever, the Court gave no guidance to the lower court on how efficiency claims were to be weighed against evidence of exclusionary purpose and effect. The instant case presents just this issue.

II. The Rule of Per Se Legality Fashioned by the Court of Appeals for Any Practice Having a Colorable Business Justification Is an Unprecedented and Unjustified Overreaction to the Concern That Antitrust Suits Under Section 2 Will Deter Aggressive Competition by Large Firms

Despite the jury's apparent conclusion that Blue Cross' Prudent Buyer program constituted exclusionary conduct, the court of appeals held, as a matter of law, that it could not be so categorized. The court reasoned that "insisting on a supplier's lowest price . . . tends to further competition on the merits and, as a matter of law, is not exclusionary." Pet. App. 19a.

There is no basis in the precedents of this Court or elsewhere, however, for holding that any conduct that facially "tends to further competition on the merits" is lawful per se—thus rendering nugatory all other evidence. If the court of appeals is to be believed, summary judgment for a monopolist would be appropriate even though the plaintiff could demonstrate that a seemingly innocuous practice did not in fact "further competition on the merits" but instead gratuitously raised rivals' costs and increased the monopolist's market power. Surely this is not the law.

Some have argued that certain vertical restraints of trade should be declared lawful per se.[8] Such arguments are also based on the now-familiar fear that the threat of nonmeritorious antitrust suits will inhibit desirable competitive behavior—specifically, a manufacturer's efforts to market its products efficiently, or in combination with desired services, in competition with other sellers. However, this Court has protected against the stifling of efficient marketing strategies, not by ruling that certain practices are per se legal, but by raising plaintiffs' burden of proving that there was an actual vertical agree-

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[8] *E.g.*, Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).

ment to fix resale prices. Thus, the Court held in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984), that, in order to prevent "highly ambiguous evidence" from being misconstrued by the finder of fact, the plaintiff must tender evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), the same evidentiary requirement was imposed in granting summary judgment against plaintiffs alleging an improbable horizontal conspiracy to practice predatory pricing.

Admittedly, there is some lower court authority for a special rule of per se legality under Section 2 for certain prices that plaintiffs might allege to be predatory. Thus, certain prominent scholars have argued that, whatever the evidence of intent and effect on competition, a claim of predatory pricing should not be submitted to the jury if the putative predator did not set prices that were "below some appropriate measure of cost." *Matsushita*, 475 U.S. at 584-85 nn.8, 9, citing Areeda & Turner, *Predatory Pricing and Related Practices Under the Sherman Act*, 88 Harv. L. Rev. 697 (1975). Indeed, the leading judicial authority for the per se legality of prices above both "incremental cost" and "average total cost" is Judge Breyer's opinion for the First Circuit in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 233-35 (1st Cir. 1983). *See also A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *petition for cert. filed*, No. 89-1075 (Dec. 29, 1989).

The arguable justification for conclusively presuming legality in certain predatory pricing cases is that, despite the rarity of true predatory pricing, *Matsushita*, 475 U.S. at 588, there is still a great temptation for competitors facing stiff price competition from efficient large firms to file antitrust suits portraying themselves as victims of such price predation. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986). Without a basis for dismissing these cases at an early stage, there

is always a risk that juries will find violations based on equivocal evidence of intent. *Barry Wright*, 724 F.2d at 232, 235. Even so, however, the proposal to adopt such a rule of per se legality has engendered great controversy,[9] and some lower courts have refused to embrace the idea.[10] This Court has never specifically addressed the issue. *Cargill*, 479 U.S. at 117 n.12.

In any event, assuming, arguendo, that there are considerations that might warrant a rule of per se legality in certain predatory pricing cases, no similar considerations are present in the circumstances of this case.[11] The physician petitioners are not complaining about being forced to accept low prices or to compete for patients on the basis of price. On the contrary, their complaint is that Blue Cross penalized them *for* competing—by marketing their services at a discount outside the Blue Cross system. By the same token, Ocean State itself was not an

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[9] *See, e.g.*, National Commission for the Review of Antitrust Laws and Procedures, *Report of the President and the Attorney General* 149-51 (Jan. 22, 1979).

[10] *See, e.g., Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1386-88 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983) (rejecting per se legality of prices above average total costs), and cases there cited. Nor has this Court itself ever indicated that a rule of per se legality is a proper response to the danger that price competition might be inhibited. *See Matsushita*, 475 U.S. at 585 n.9. Indeed, its hesitancy in applying and extending rules of per se illegality in recent cases under Section 1 suggests that per se rules of all kinds are to be approached with great caution. *See, e.g., Northwest Wholesale Stationers*; *Broadcast Music*, 441 U.S. at 19-24.

[11] Although health care providers have brought many antitrust suits to contest hard bargaining by large purchasers, the courts have consistently rejected them. *E.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); *Kartell v. Blue Shield of Mass.*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). Such suits have therefore become less common, demonstrating that large buyers do not need any special protection against erroneous outcomes or the high cost of litigation challenging their aggressive purchasing.

inefficient competitor seeking the court's protection against hard competition by an efficient rival. Indeed, it was Ocean State which initiated the discounts that Blue Cross now wants to eliminate through the exercise of its market power. Clearly, the Blue Cross plan in this case is decidely not one of those health insurers that pursues aggressive cost containment in the interest of consumers.[12]

Following its approach in *Monsanto* and *Matsushita*, this Court might rule in this case that the lower courts should protect conduct that is potentially beneficial to consumers, not by adopting rules of per se legality, but by requiring plaintiffs to produce evidence that "tends to exclude the possibility" that the practices challenged were procompetitive, efficiency-enhancing, or otherwise nonpredatory business behavior consistent with "competition on the merits."[13] Such a ruling would discourage antitrust suits by competitors merely seeking protection against hard competition, thus preserving the vigorous competition that modern antitrust law seeks to foster on consumers' behalf. But unlike the court of appeals' holding in this case, it would not leave Section 2 of the Sherman Act a dead letter against any exclusionary conduct that facially resembles ordinary business activity.[14]

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[12] It is ironic that the same court of appeals that handed down the leading cases (1) defending large firms against competitors' misplaced charges of predatory pricing (*Barry Wright*) and (2) protecting large health insurers against physicians' misplaced charges of monopsonistic purchasing (*Kartell*) should have failed so conspicuously in applying those cases' underlying principles in this case. It should be noted that Judge Breyer, the former law professor who authored the opinions in both *Barry Wright* and *Kartell*, was not on the panel in *Ocean State*.

[13] The following widely cited definition of exclusionary conduct suggests such a heavy burden of proof: "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626b at 78 (1978).

[14] Because the petitioners in this case offered a great deal of evidence showing the anticompetitive purpose and effect of Blue Cross'

The errors of the court of appeals in this case are perhaps understandable in light of some of the leading court of appeals decisions under Section 2 in recent years. These decisions have heavily emphasized the importance of allowing even undoubted monopolists to follow normal business practices.[15] Although it is certainly important to avoid judicial "handicapping" in an artificial effort to equalize the competitive race, a defendant monopolist should not be entitled to win merely by demonstrating that its action had a "rational basis." The rule-of-reason test of *Aspen Skiing* surely requires stricter scrutiny than that—i.e., more than a search for some rationale for the challenged conduct that is both facially plausible and permissible.[16] Yet, without clearer guidance from this Court, lower courts may simply accept, as the court of appeals did in this case, any facially plausible explanation for a monopolist's strategic maneuvers, even though those practices could be seen under "close scrutiny" to have been intended to raise rivals' costs and to perpetuate the monopolist's freedom to charge supracompetitive prices.[17] Again, the correct way to ensure that competition is not jeopardized unnecessarily, either by inhibiting antitrust rules or by monopolistic practices, is to make plaintiffs demonstrate affirmatively—as Ocean State did—that competition and consumer welfare were harmed, not helped, by the practices in question.

Prudent Buyer program, they were entitled to the benefit of the jury's verdict.

[15] *E.g.*, *Telex* and *Berkey Photo*, described *supra* note 3.

[16] *See supra* note 7.

[17] The defendant in *Aspen Skiing* lost because it "did not persuade the jury that its conduct was justified by any normal business purpose." 472 U.S. at 608. In this case, Blue Cross similarly failed to convince the jury, yet won because the court of appeals was unwilling to let the jury decide the issue. Actually, however, the skiing monopolist's object of preventing a free-riding competitor from sharing the rewards from its lawful monopoly (which, after all, attracted skiers to Aspen) was a more "normal business purpose" than Blue Cross' object of inducing physicians to deal exclusively with it and to boycott Ocean State.

III. The Court of Appeals Egregiously Misconstrued Blue Cross' Prudent Buyer Plan in Viewing It, as a Matter of Law, as a Cost-Reducing Measure That "Tends to Further Competition on the Merits"

In characterizing the Prudent Buyer plan as nothing more than "insisting on a supplier's lowest price," the court of appeals chose to see Blue Cross' effort only as a cost-reduction strategy. The court of appeals was wrong on three counts—first, in believing that Blue Cross was truly and primarily interested in reducing its costs; second, in believing that Blue Cross' method was calculated to "get the lowest possible price" or "the best deal possible" (Pet. App. 19a-23a); and third, in believing that allowing the practice would "bring low price benefits to the consumer" (*id.* at 21a). Far from justifying the court's view of the case, the evidence in the record easily supports the jury's apparent conclusion that the program was part of a scheme to pay physicians, not less, but more—as long as they did not sell their services at a discount to Ocean State. This strategy was specifically intended to perpetuate Blue Cross' position as the physicians' exclusive marketing agent, to raise Ocean State's costs, and to enhance Blue Cross' power over price. The record shows that consumers paid higher prices, not lower, as a consequence of Ocean State's reduced ability to check Blue Cross' premium increases.[18]

That Blue Cross was not interested in getting "the best deal possible" from physicians is easily demonstrated by comparing what it did with the actions of comparable insurers in the *Kartell* and *Ball Memorial* cases, *supra* note 11. In those cases, the courts (in opinions by Judges Breyer and Easterbrook, respectively) upheld health insurers' aggressive cost reduction efforts against antitrust challenges lodged by the affected providers. Those insurers, in demanding that providers accept the plan's allowances as payment in full (*Kartell*) or that they offer their best price in competitive bidding (*Ball Memorial*),

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[18] J.A. 1110-13, 1847-49, 2183-84.

were plainly engaged in efforts to "get the best deal possible" for their subscribers. Despite the view of the court of appeals that the result in *Ocean State* was "compelled" by its earlier holding in *Kartell*, the Rhode Island plan followed a policy fundamentally different from the aggressive cost containment seen in both *Kartell* and *Ball Memorial.*

Thus, Blue Cross allowed "balance billing" by nonparticipating physicians and sought lower fees only from those physicians that persisted in dealing with Ocean State—hardly the way to "get the best deal possible" from physicians. Thus, instead of concluding that Blue Cross was seeking only to pay lower prices, the court should have said that Blue Cross was offering to pay *more* to each physician who eschewed marketing at a discount through other outlets.[19] Despite its euphemistic name, the Prudent Buyer program was not calculated to obtain low physician fees in general, but only to penal-

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[19] Ironically, the first case to approve efforts by a Blue Cross or Blue Shield plan to "get the best deal possible"—indeed, the case from which the *Kartell* and *Ocean State* courts quoted that phrase—also misconstrued the plan's actions and excused what was in fact a monopolistic rather than simply a cost-containment strategy. *Travelers Ins. Co. v. Blue Cross of Western Pa.*, 481 F.2d 80, 84 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973). The discounts from regular hospital charges enjoyed by the Blue Cross plan in that case were not the result of hard bargaining with competing hospitals. Instead, "the hospitals negotiated *jointly*" with Blue Cross (*id.*)—that is, as a cartel. By accepting from the hospital association a smaller discount than it could have gotten by forcing the hospitals to compete, the insurer monopolist kept the cartel intact as an obstacle to its would-be competitors, raising their costs. *See* Krattenmaker & Salop, *supra*, 96 Yale L.J. at 238-40 (maintenance of supplier cartel as an exclusionary practice). Although paying hospitals more than if it had used its purchasing power to destroy their cartel, Blue Cross enjoyed a greater net cost advantage over its competitors than it would have had if hospitals competed for the business of all payers. For a fuller explanation of this monopolist's unrecognized strategy, *see* Havighurst, *The Questionable Cost-Containment Record of Commercial Health Insurers*, in Health Care in America 221, 250-53 (H. Frech ed. 1988).

ize Ocean State doctors.[20] Indeed, the record shows rather strikingly that Blue Cross' mind was more on raising Ocean State's costs than on lowering its own.[21]

A possible interpretation of Blue Cross' action, seemingly adopted by the court of appeals, is that it was simply targeting those doctors who had already signified their willingness to accept lower fees—in other words, that it was merely defending itself against price discrimination being practiced against it by its suppliers. But the notion that a buyer with an 80% market share was a *victim* of price discrimination is patently absurd. Far from demonstrating that Blue Cross was seeking to "get the best deal possible," this circumstance reveals that Blue Cross had assiduously *refrained* from exercising its buying power against physicians and that it was Ocean State that finally brought competition to the market for physician services in Rhode Island. Of course, if Blue Cross had used its buying power to the fullest in the consumer's interest instead of using it selectively to obtain an unnatural market advantage, there would have been no basis for Ocean State to complain. But it is Blue Cross that is price-discriminating—in what it pays physicians—obviously hoping by such discrimination to discourage doctors from embarking on the competitive path of discounting their services and selling through alternative outlets.

IV. Monopolistic Practices by Insurers of the Particular Kind Involved in This Case Threaten Competition Not Only in the Market for Private Health Care Financing but, Even More Importantly, in the Market for Physicians' Services

Nonprofit health insurance offered under the Blue Cross and Blue Shield trademarks has a long and venerated history in the United States. As the market for

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[20] "Prudent purchasing" is a term of art in the health care industry signifying aggressive purchasing of precisely the kinds found in *Kartell* and *Ball Memorial*.

[21] J.A. 336-39, 850-55, 1208-09, 1220-22, 1227-31; P.E. 45, 294, 344.

health insurance has evolved in different places, however, two essential types of "Blue" plans have emerged—one selling services on behalf of providers and the other purchasing services on behalf of its subscribers. Although nearly all Blue plans began life as monopolistic joint selling agencies controlled by the providers whose services they sold,[22] provider control gradually eroded. Some plans evolved into ordinary insurers, purchasing services as consumers' agents. But others, particularly those with very large market shares, found that their corporate interests were still served best by remaining the ally of providers rather than by becoming aggressive purchasers of their services. The respondent in this action is a prime example of a plan whose monopoly made this a feasible strategy—as was the Blue Cross plan in the 1973 *Travelers* case, discussed *supra* note 19. The plans in *Kartell* and *Ball Memorial* are examples of plans with a different orientation. *See* Pet. 19 (on Indiana Blue Cross' switch to the consumer's side).

In expressly characterizing the Rhode Island plan as one that "purchases health services . . . on behalf of its subscribers," Pet. App. 2a, the *Ocean State* court signified its failure to focus on the crucial distinction between that plan and the plans in *Ball Memorial* and *Kartell*. In that distinction lies one of the keys to this case. The Blue Cross monopolist, hoping to enjoy the benefits of its dominant market position, undertook to induce exclusive dealing by strategic pricing, charging more to employers who offered the Ocean State option and paying less to physicians who marketed through an alternative plan. These strategies were aimed at stamping out alternative health plans and raising the costs of any that survived. Under the Blue Cross monopoly, there would be virtually no opportunity for a physician to engage in price competition—that is, to increase patient volume by lowering price. Thus, Blue Cross suppressed

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[22] *See* Bureau of Competition, FTC, Staff Report on Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans (Apr. 1979) (unpublished).

the competition from which consumers had the most to gain (and Blue Cross had the most to lose).

The ultimate reason why the court of appeals could see little potential harm to consumers in what Blue Cross did to Ocean State is that it overlooked entirely the possibility that a dominant nonprofit health insurer might have monopolistic reasons of its own for *not* seeking to "get the best deal possible" [23] and for instead allying itself explicitly or implicitly with providers and suppressing competition among them.[24] In fact, however, a nonprofit, regulated health insurer has little reason not to overpay providers if it can thereby prevent the emergence of alternative outlets through which they can sell their serv-

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[23] The practice of paying physicians supracompetitive fees in order to raise rivals' costs could easily qualify for condemnation as a predatory practice under the rationale routinely used in condemning predatory pricing. Significant current outlays aimed, not at increased efficiency, but only at gaining or keeping a monopoly are appropriate targets for policing under Section 2. *See* R. Bork, *supra*, at 137-48.

[24] The theory that Blue Cross sought to monopolize by specifically refraining from efforts to "get the best deal possible"—from everyone, that is, except Ocean State physicians—must be examined to see whether it makes "economic sense." *Matsushita*, 475 U.S. at 598 (approving grant of sumary judgment against plaintiffs on the ground that complaint, which contemplated a decades-long, improbable conspiracy to practice predatory pricing, "simply [made] no economic sense"). After all, it might be argued, a rational Blue Cross monopolist would not choose to incur unnecessarily high costs in the short run if it could not realistically hope to recover them in the long run—either because the firm is subject to price regulation or because its nonprofit character precludes anyone's direct enjoyment of future monopoly profits. But a business strategy of serving provider rather than consumer interests would appeal to a nonprofit, regulated insurer precisely because it is regulated and has no significant interest in profits as such. Such a firm can enjoy the nonpecuniary benefits that flow from monopolizing the marketing of physician services—e.g., large size and cash flow, with the attendant prestige, perquisites, and job security for corporate managers—while regulation, which regards the costs incurred for physician services simply as an expense to be passed on to consumers, allows the physicians to enjoy the monetary rewards.

ices. Only if this Court corrects the errors made by the court of appeals in this case can Section 2 be used to prevent similar abuses in other health care markets.

V. The Practices Immunized by the Court of Appeals in Applying the McCarran-Ferguson Act Are Potentially Destructive of Important Competition in Provider Markets as Well as in "the Business of Insurance." A Different Reading of the Act Would Provide Needed Protection Against Such Abuses

Although this Court reasonably might elect in this case to review only those issues related to Blue Cross' Prudent Buyer program, the issues raised under the McCarran-Ferguson Act are of equal practical significance. Indeed, actions of the kind treated by the court of appeals as immune from antitrust attack under the McCarran Act also have the potential for destroying the market opportunities of HMOs and other innovative health plans and for foreclosing competition among providers. If dominant health insurers are able to practice differential pricing, ostensibly to offset the effects of adverse selection, without meaningful regulatory oversight, emerging HMOs and other competitive medical plans will be easy targets for predatory pricing. Moreover, regulated nonprofit insurers like Blue Cross have less of a disincentive to engage in predatory pricing than other would-be monopolists because they have reserves that can be used to defray current losses and that can be replaced through higher rates once the threat is past. In addition, they operate over geographic areas larger than most HMOs, yet can target their price cuts and sail their "fighting ship" HMOs wherever competition threatens to get a foothold. They may also be able to reduce their payments to providers (an apparently procompetitive move) as a way of financing a predatory campaign, a practice that many providers may approve as a way of staving off competition that they too wish to avoid. Even if regulators are alert, they may be hard-pressed to prevent pricing strategies that are exclusionary in fact. If the regulators fail, as in this case, even

to consider the specific practices that carry the risk of abuse, antitrust immunity is an invitation to suppress the most promising forms of price competition in the health care industry.

Certainly the insurance regulatory scheme in this case left Blue Cross the opportunity to engage in predation with impunity. As petitioners argue, this Court should consider the significance of the fact that the state's oversight in this case was clearly insufficient to constitute "active state supervision" under the two-part test for "state-action" immunity laid down in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See also Patrick v. Burget*, 486 U.S. 94 (1988).

There is some authority for the view that the McCarran exemption, being explicit, is broader than the comity-inspired implied exemption for state action. However, the McCarran Act was passed well before the courts, construing the Sherman Act not to preempt the states as economic policy makers, finally defined what a state must do before federal antitrust policy will give way. This Court should take this occasion to consider the argument that the McCarran Act, in requiring state regulation as a condition of exemption, was simply a precursor of the state-action doctrine and did not provide any more sweeping immunity than that which this Court subsequently inferred from the Sherman Act itself. It seems unlikely, for example, that Congress, in the same statute that expressly barred state insurance regulators from authorizing predatory "boycott[s], coercion or intimidation," intended to free private insurers to set possibly predatory prices without actual state supervision. As petitioners observe, this case provides an ideal vehicle for addressing this extremely important issue. As petitioners also argue, even if the McCarran defense is valid for two of the three tactics Blue Cross employed against Ocean State, this Court should still indicate that evidence concerning the nature and mono-

polistic tendency of those actions is relevant in interpreting the nonexempt conduct.

CONCLUSION

The court of appeals rested its decision in this case in part on its "reluctan[ce] to interfere in the domain of medical costs, 'an area of great complexity.'" Pet. App. 21a, quoting *Kartell v. Blue Shield of Mass.*, 749 F.2d 922, 931 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985). AMCRA respectfully submits that the health care industry is a crucially important sector of the economy in which to ensure that competition is operating and that its "complexity" provides no justification for adopting legal rules that obscure market reality. Fortunately, this Court has itself not been reluctant to address difficult antitrust issues arising in the health care and health insurance industries in recent years.[25] Unfortunately, the Court must visit the field once again.

Respectfully submitted,

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[25] *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981); *American Medical Ass'n v. FTC*, 455 U.S. 676 (1982) (per curiam) (affirmed by an equally divided court); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 1551 (1984); *Patrick v. Burget*; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 477 (1986).